

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Promoting the Availability of	)	MB Docket No. 16-41
Diverse and Independent	)	
Sources of Video Programming	)	
	)	
	)	

**COMMENTS OF FUSE MEDIA, INC.**

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January 26, 2017

## **Table of Contents**

<b>I. INTRODUCTION AND SUMMARY.....</b>	<b>1</b>
<b>III. CURRENT MARKET DYNAMICS MATERIALLY IMPACT FUSE’S ABILITY TO COMPETE FOR VIEWERS. ....</b>	<b>3</b>
<b>IV. THE COMMISSION SHOULD ADDRESS BUNDLING ABUSES BY LARGE NON- INDEPENDENT PROGRAMMERS. ....</b>	<b>4</b>
<b>V. THE COMMISSION SHOULD ADOPT ITS PROPOSED RULES PROHIBITING UNCONDITIONAL MFNs AND UNREASONABLE ADMs. ....</b>	<b>6</b>
<b>A. The Commission correctly concludes that unconditional MFNs serve no market-based     purpose. ....</b>	<b>6</b>
<b>B. The Commission correctly concludes that unreasonable ADMs harm independent     programmers’ ability to compete in the emerging online video space. ....</b>	<b>7</b>
<b>C. The Commission should define “independent” programmers as those not affiliated with an     MVPD, broadcaster, or motion picture studio. ....</b>	<b>9</b>
<b>VI. CONCLUSION .....</b>	<b>10</b>

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**COMMENTS OF FUSE MEDIA, INC.**

**I. INTRODUCTION AND SUMMARY.**

FUSE Media, Inc. (“FUSE”) hereby submits these comments in response to the Commission’s Notice of Proposed Rulemaking (“Notice”) in the above-captioned proceeding. FUSE, which consists of two cable/satellite networks, FUSE and FM, is distributed to about 70 million and 45 million homes nationwide, respectively. FUSE is an independent programmer not under common ownership with a cable operator, broadcaster, or motion picture studio. The FUSE-branded network is a national cable network for a young, Latino and multicultural audience with a broad array of high-quality content including music, comedy, culture and lifestyle programming. The FM-branded network is a new cable network and digital media brand that delivers an innovative programming line-up with music at its core.

Current market dynamics materially impact FUSE’s ability to reach its audience. Major distributors’ significant share of the pay-TV market enables them to extract significant concessions from independent programmers. This harms competition for providing niche audiences with high quality, differentiated programming at the best value, and undermines competition horizontally among Pay-TV distributors.

The Commission should address conglomerate programmers' bundling practices as part of any effort to improve competition in the video market, or risk rendering its proposed rules ineffective. The bundling practices of large programmers harm competition in programming content, foreclosing meaningful growth prospects for independent programmers. Even where distributors believe that carrying FUSE at a fair price would add value, many frequently claim that they are unable to do so because of onerous and unyielding demands by large, non-independent programmers for carriage of the full stable of their cable networks. The bundling practices of large programmers also harm competition in the video distribution market.

FUSE supports the Commission's tentative conclusion that the potential harms to competition, diversity, and innovation resulting from unconditional MFN provisions outweigh any potential public interest benefits and believes that the Commission should adopt its proposed ban on unconditional MFNs. FUSE also supports the Commission's finding that certain restrictive ADM provisions have no discernibly pro-competitive justifications and have an adverse impact on the provision of diverse programming sources to consumers. FUSE believes that a ban on unreasonable ADM clauses is warranted.

FUSE agrees with other commenters who argued for a more accurate definition of "independent" programmer under the proposed rules. In FUSE's experience, the large programmers that already possess sufficient leverage to avoid the most burdensome MFN and ADM clauses are those with shared ownership by MVPDs, broadcasters, and movie studios. Such entities therefore should not be defined as "independent."

## **II. CURRENT MARKET DYNAMICS MATERIALLY IMPACT FUSE’S ABILITY TO COMPETE FOR VIEWERS.**

The Commission correctly concludes that “certain participants in the video marketplace, particularly independent content producers and OVDs, are facing significant challenges.”<sup>1</sup> It observes that MVPDs “have used their bargaining leverage vis-à-vis independent programmers” to impose contract clauses, including the unconditional MFN and unreasonable ADM provisions, that “hamper the ability of programmers to experiment with online distribution [and] make it challenging for programmers to achieve a profitable level of carriage, or to secure carriage without contracting away their freedom to present content to a broader audience via the Internet.”<sup>2</sup> FUSE agrees.

Each of the largest pay-TV distributors is in a position to materially impact any network’s ability to reach its audience. The FUSE and FM networks currently pass about 70 million cable and satellite homes; a top pay-TV distributor serving between 10 and 25 million homes therefore represents roughly 15-25% of the networks’ entire distribution base. This gives each such distributor sufficient leverage to unduly pressure FUSE to make anti-competitive concessions or, if unheeded, face losing potential (or actual) distribution and significant risk to the company’s financial viability. This is particularly true in major local markets, such as New York, Los Angeles, and Miami, where FUSE over-indexes in ratings and audience appeal, granting the distributors even more bargaining leverage and ability to make unilateral demands.

Major Pay-TV distributors’ heightened bargaining leverage over independent programmers harms competition in providing audiences with certain content, and undermines competition horizontally among Pay-TV distributors. For example, FUSE competes against non-

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<sup>1</sup> *Promoting the Availability of Diverse and Independent Sources of Independent Programming*, Notice of Proposed Rulemaking,, FCC No. 16-129, MB Docket No. 16-41 (rel. Sept. 29, 2016) (hereafter “Notice”) ¶ 6.

<sup>2</sup> Notice at ¶ 7.

independent networks, such as FX, BET, and MTV, for viewers in the Millennial (18-34 year old) Latino and multicultural demographic. Those networks, however, are available in more homes and in more popular programming tiers than are the FUSE networks, putting FUSE at a competitive disadvantage and depriving a major market segment of the benefits of differentiated content and true competition.

The same dynamic impacts horizontal competition on the distribution side of the video market. As the ACA explained, a number of small cable operators are leaving the video market altogether.<sup>3</sup> T-Mobile, while not a small company by any means, nevertheless is a nascent video distributor in the wireless space, where FUSE would be able to reach new audiences if permitted to do so. T-Mobile observed that “new entrants in the marketplace pay significantly more for access to programming in comparison to large distributors” and urged the Commission to assess “whether new entrants to the video marketplace are unable to gain access to programming on terms that will allow them to compete effectively with larger distributors . . . .”<sup>4</sup> The difficulties obtaining content at favorable terms includes content from independent networks like FUSE. This harms consumers who would be better served with niche content because FUSE ends up with fewer distribution options.

### **III. THE COMMISSION SHOULD ADDRESS BUNDLING ABUSES BY LARGE NON-INDEPENDENT PROGRAMMERS.**

The bundling practices of large programmers harm competition in programming content. Independent programmers widely assert on the record that the bundling practices of major

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<sup>3</sup>American Cable Association NOI Comments at 9. “A growing number of small cable operators have begun to transition to a broadband-centric model. Indeed, a handful have abandoned video altogether. The executive of one such operator explained his choice simply: ‘[T]he TV model is broken.’” ACA NOI Comments at 10. See also ITTA NOI Comments at 2 (“Entering the market as the third, fourth, or fifth competitor is not easy. . . .”).

<sup>4</sup>T-Mobile NOI Reply Comments at 8.

programmers harm consumers and merit Commission action.<sup>5</sup> FUSE agrees. The bundling practices of large, non-independent programmers harm FUSE's ability to gain and expand distribution and – even when distributed - receive optimal compensation from distributors. Even where distributors believe that carrying FUSE at a fair price would add value, they claim that they are unable to do so because of demands by large, non-independent programmers. Specifically, such non-independent programmers will demand carriage of multiple networks at high fees as a condition of receiving the programmer's most popular networks, leaving insufficient bandwidth, resources, or both, for FUSE and other independent networks.

The bundling practices of large programmers also harm competition in the video distribution market. As stated above, anything that undermines competition among distributors harms FUSE's ability to reach the widest possible audience. As T-Mobile pointed out, such practices "might limit its ability to offer innovative program services tailored to what customers really want...."<sup>6</sup> They also often lead to independent services like FUSE being crowded out of channel capacity on smaller cable systems.<sup>7</sup> Ultimately, the consumer suffers by not having access to unique and differentiated content that best suits them.<sup>8</sup> The Commission should

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<sup>5</sup> See Ride Television Network NOI Comments at 3 ("The practice of bundling highly rated and sought after marquee channels with numerous less desirable channels has led to marketplace where bandwidth is at a premium, highly penetrated basic packages are filled, and programming dollars are consumed, leaving little room for independent networks"). See also The Blaze NOI Comments at 9 ("Forced bundling drives up the cost of linear television to MVPDs and ultimately to consumers and challenges the price elasticity of pay-TV. As consumers resist the upward price pressure created by wholesale bundling, MVPDs are forced to eliminate other programming options to cut costs. Independent programmers, without market leverage, bear the disproportional brunt of these cost cutting measures by FUSEg denied carriage, forced to accept carriage on less than market rates and terms, or dropped altogether from channel line ups").

<sup>6</sup> T-Mobile NOI Reply Comments at 7.

<sup>7</sup> See ITTA NOI Comments at 5 ("Smaller and new entrant MVPDs are forced to purchase the bundled offering, which limits the channel capacity and resources they have available for the carriage of diverse, independent sources of video programming. Moreover, forced bundling impedes the ability of new entrant MVPDs to distinguish their services from incumbents by offering diverse, independently-produced content in lieu of programming foisted on them by the large media entities").

<sup>8</sup> Accord, ACA NOI Comments at 20 ("The loss of diversity caused by forced bundling sometimes cuts especially deep for two reasons. First, the bundled channels sometimes duplicate one another. For example, Viacom's Teen-Nick is largely composed of re-aired shows from Viacom's Nickelodeon. Second, the bundled programming often

address large, conglomerate, non-independent programmers' bundling practices as part of any effort to improve competition in the video market, or risk rendering its proposed rules ineffective.

#### **IV. THE COMMISSION SHOULD ADOPT ITS PROPOSED RULES PROHIBITING UNCONDITIONAL MFNs AND UNREASONABLE ADMs.**

##### **A. The Commission correctly concludes that unconditional MFNs serve no market-based purpose.**

FUSE supports the Commission's tentative conclusion that the "potential harms to competition, diversity, and innovation resulting from unconditional MFN provisions outweigh any potential public interest benefits."<sup>9</sup> We agree with the Commission's finding that "unconditional MFN provisions entitle an MVPD to the most favorable terms granted to other distributors without obligating the MVPD to provide the same or equivalent consideration in exchange for those terms" and therefore "appear designed to discourage or foreclose the wider distribution of video content on online platforms."<sup>10</sup>

Unconditional MFNs limit FUSE's ability to offer innovative, creative, and pro-consumer terms to distributors. This applies to the emerging and exciting world of OVDs and OTT distribution. More than once, FUSE had the opportunity to secure valuable and necessary distribution on a new OTT platform on fair terms relative to arrangements with cable and satellite operators, potentially expanding brand awareness and exposure to new audiences. The OTT terms - despite the lack of material benefit accruing to traditional MVPDs - would have triggered unconditional MFN provisions, rendering such growth-enhancing relationships

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fails to serve the particular needs of the communities served by the small cable operator. Many ACA members, for example, serve rural areas...").

<sup>9</sup> Notice at ¶ 20.

<sup>10</sup> Notice at ¶ 19.



unviable. Thus, pro-consumer, creative, innovative distribution arrangements are often precluded by unconditional MFNs.

**B. The Commission correctly concludes that unreasonable ADMs harm independent programmers' ability to compete in the emerging online video space.**

The Commission accurately concludes that “certain restrictive ADM provisions have no discernibly pro-competitive justifications and have an adverse impact on the provision of diverse programming sources to consumers” including, as the Department of Justice found, “lower-quality services, fewer consumer choices, and higher prices.”<sup>11</sup> A “reasonable” ADM clause would allow a Pay-TV distributor to retain the primary benefits of its investment in programming. FUSE understands that against the backdrop of rapid changes in the way consumers want to watch video on myriad platforms, Pay-TV distributors logically want to protect their “investment in programming”<sup>12</sup> such that their subscribers who pay a monthly fee receive specific value for that payment. Some restrictions on programmers’ distribution of content on alternative platforms therefore make sense.

The ADM clauses that only serve to undermine programmers’ ability to reach consumers (particularly independent programmers relative to non-independent programmers), however, are “unreasonable” in that, as the Commission states, they result in reduced quality, higher cost, and “fewer consumer choices.”<sup>13</sup> Such ADM clauses hinder FUSE’s and other independent programmers’ competitiveness in a rapidly changing, vibrant marketplace. By contrast, the non-independent major programmers apparently are much freer to innovate. Ultimately, the consumer suffers because independent programmers’ content is significantly less available than it could be,

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<sup>11</sup> Notice at ¶ 23 (citing DOJ’s Charter/Time Warner Cable Competitive Impact Statement at 14).

<sup>12</sup> AT&T NOI Comments at 13.

<sup>13</sup> Notice at ¶ 23.

thereby restricting video choice and competition. ADM clauses in FUSE’s agreements with major distributors have limited FUSE’s ability to offer content on emerging online, digital, and mobile platforms in ways that do not provide a material benefit to the MVPDs. Alternative distribution methods would allow FUSE to expose new audiences to the networks’ content, driving brand awareness and network viewership.

ADM clauses take many forms. They address the delivery of content – for free or at a cost to the consumer – on a third party’s OTT platform, the programmer’s own website or “app,” or on wireless handheld devices. The most restrictive such clauses severely limit the number of hours of content FUSE may make available per month; prohibit distribution of the most popular shows or the release of show premieres and/or finales; curtail the ability to promote or provide different original programming than what is provided on the networks; or restrict the days and times when content may be made available on alternative platforms. With independent programmers like FUSE bound by such restrictions, dominant MVPDs not only deprive new audiences of content choices but dampen horizontal competition from emerging OTT platforms.

The Commission correctly differentiates between “reasonable” and “unreasonable” ADM clauses but too broadly defines a limited ban on free direct-to-consumer ADM distribution as reasonable.<sup>14</sup> For example, under some ADM clauses, after a FUSE original series ends its run on the network, FUSE must wait at least six months to offer that series on the FUSE app. This six-month ban curtails FUSE’s ability to capitalize fully on its content and marketing investments while offering little if any marginal benefit to the distributor. FUSE recommends that the rules specify a shorter time period, such as 30-90 days, as the safe harbor period to establish a reasonable restriction on offering content free to the consumer on an OTT platform.

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<sup>14</sup> See proposed §76.1301(e)(2)(i) (defining as reasonable an ADM clause that prohibits providing content for free over the Internet “*for a limited period* after the programming’s initial linear airing”) (emphasis added).

**C. The Commission should define “independent” programmers as those not affiliated with an MVPD, broadcaster, or motion picture studio.**

The Notice asks how best to define “independent” programmer in order to ensure that any relief is targeted to where it is most needed and refers to a proposal by ITTA to define as “independent” a programmer not affiliated with an MVPD, broadcaster, or movie studio.<sup>15</sup> FUSE supports the ITTA definition as an adequate delineation between programmers that possess negotiation leverage by virtue of shared ownership with powerful media properties and those, like FUSE, that do not. In FUSE’s experience, the large programmers that already possess sufficient leverage to avoid the most burdensome MFN and ADM clauses are those with shared ownership by MVPDs, broadcasters, and movie studios. The ITTA definition appropriately would exclude from “independent” the networks owned by NBCU, Disney, 21<sup>st</sup> Century Fox, CBS, Viacom, and Time Warner. The Commission’s originally proposed definition of independent (i.e., not affiliated with an MVPD) would have deemed all of these except NBCU as independent, probably not the optimal outcome.

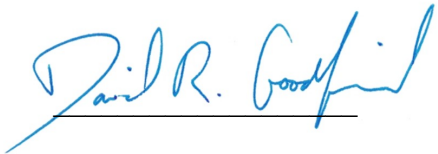
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<sup>15</sup> Notice at ¶ 17.

## V. CONCLUSION

FUSE supports the Commission's proposed rules prohibiting unconditional MFN and unreasonable ADM clauses in affiliation agreements between MVPDs and independent programmers, as defined herein. Consumers ultimately benefit from a vibrant video market; consolidation among both distributors and programmers means that they currently do not receive all the potential benefits of a truly competitive video market. The Commission's proposed actions would begin to address this imbalance.

Respectfully submitted,



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January 26, 2017